

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1913.

No. 727.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WILLIS N. BIRDSALL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF IOWA.

FILED OCTOBER 2, 1913.

(23878)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 727.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WILLIS N. BIRDSALL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF IOWA.

INDEX.

	Original.	Print.
Caption.....	a	1
Order filing indictment No. 4164.....	1	1
Indictment No. 4164.....	2	1
Order filing indictment No. 4165.....	13	8
Indictment No. 4165.....	14	8
Motion to consolidate.....	25	15
Order to consolidate.....	27	17
Demurrer to indictment No. 4164.....	28	17
Opinion.....	35	21
Opinion in United States v. Van Wert, No. 4149.....	43	26
Opinion in Nos. 4147 and 4148.....	51	31
Opinion in United States v. Brents, No. 4150.....	52 $\frac{1}{2}$	32
Judgment.....	53	33
Assignment of errors.....	53	33
Petition for writ of error.....	55	34
Allowance of writ of error.....	56	34
Order allowing writ of error.....	57	35
Writ of error.....	58	35
Citation and service.....	60	37
Clerk's certificate.....	62	37



a UNITED STATES OF AMERICA,
Northern District of Iowa, ss:

Pleas before the District Court of the United States in and for the Northern District of Iowa, Eastern Division, at a term begun and held at Dubuque, in said district, on the 4th Tuesday of April, 1913, before Hon. Henry T. Reed, judge of the Northern District of Iowa.

UNITED STATES OF AMERICA,
vs.
WILLIS N. BIRDSALL. } Nos. 4164 and 4165 consolidated.

Be it remembered that heretofore, to wit on the 4th day of December, A. D. 1912, the following proceedings were had by said court in the foregoing-entitled cause, as appears of record on page 13 of Record N of said court, to wit:

1 UNITED STATES OF AMERICA | No. 4164. Presentment, bill of
vs. | indictment.
WILLIS N. BIRDSALL. |

Now on this 4th day of December, 1912, the grand jury in and for the United States district in and for the Northern District of Iowa, heretofore duly empanelled, came into court and, by their foreman, presented to the court a true bill of indictment against Willis N. Birdsall, charging him with the crime of unlawfully and knowingly offering a bribe to an officer of the United States, to wit, a deputy special officer of the Department of Indian Affairs, viz, Everett E. Van Wert, committed within the jurisdiction of this court, whereupon, on motion of H. J. Bone, special attorney of the United States,

It is ordered by the court that said indictment be received and filed. Thereupon the same was duly endorsed by the clerk as follows: Presented in open court by the foreman of the grand jury in presence of said grand jury and filed by me this 4th day of December, 1912.

Said bill of indictment so received and filed is in words and figures following, to wit:

2 UNITED STATES OF AMERICA,
Eastern Division of the Northern District of Iowa.

In the District Court of the United States in and for the district aforesaid, at the December term thereof, A. D. 1912;

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, in the court aforesaid, on their oath present and charge that the 30th day of May, in the year 1910, and for more than a year next prior thereto, and during all the dates and times hereinafter mentioned and set forth, in said district and within the jurisdiction of said court, Everett E. Van Wert was then and there a person acting for and in behalf of the United States in an

official capacity, to wit, a deputy special officer for the suppression of the liquor traffic with and among Indians; under and by virtue of the authority of a department of the Government, to wit, the Department of the Interior of the United States, the said Everett E. Van Wert having been theretofore duly and legally appointed such deputy special officer by the Commissioner of Indian Affairs under and by virtue of the authority of the Secretary of the Interior.

That in the performance of his official functions as such deputy special officer, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, the said Everett E. Van Wert was then and there charged with the duty and called upon and required among other things to make recommendations to his said superior officer, the Commissioner of Indian Affairs, either directly or through other subordinates of the said Commissioner of Indian Affairs, concerning

all matters connected with the conviction and punishment of
3 persons who would unlawfully sell liquor to Indians or otherwise violate the laws of the United States in reference to the liquor traffic affecting the Indians, and to inform and advise the said Commissioner of Indian Affairs, either directly or through other subordinates of said commissioner, when called on so to do, in all such matters and in all matters relating thereto, and particularly, when called on so to do, to inform the said commissioner whether or not the effective suppression of the liquor traffic with and among Indians would be furthered or prejudiced by executive or judicial clemency in any particular case; and in all the said matters and in all matters relating thereto to act without partiality or favor and truthfully and without violating or betraying the confidence and trust reposed in him, the said Everett E. Van Wert.

That at the April term of said court, in the year 1909, in and for said district, the following-named persons, to wit, Charles S. Parker, William Kascht, Peter Wagner, William Wagner, Carl J. White, Edward Westhoff, P. J. Goswiller, Leonard Krantz, and Jacob Guyer, were each and all indicted for unlawfully selling liquor to Indians in violation of laws of the United States, and each and all of said persons above named and indicted as aforesaid entered a plea of guilty at the December term, in the year 1909, of said court to the offences charged in said indictment, and each of said persons who were indicted and entered a plea of guilty as aforesaid were sentenced by said court at the April term, in the year 1910, to pay a fine of one hundred dollars and be imprisoned for a period of sixty days.

That before any of the aforesaid sentences were enforced or executed an application was made to the judge of the said court for a reduction of the sentences and for a suspension thereof, or part thereof, and also it was stated on behalf of the said persons who had pleaded guilty that an effort would be made to obtain a
1 commutation of the said sentences by executive action.

That then and there the judge of the said court announced that he would not change or reduce or suspend the said sentences or any part thereof, unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs; and that the United States attorney in the aforesaid district announced that he would not recommend a commutation or other Executive clemency, unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs.

That then and there and during all the dates and times herein mentioned it was and long had been the settled usage and practice for the United States judges in determining upon sentences and upon the application for changes, reductions, or suspensions thereof to consult the United States attorney, and either directly or through him the administrative officer charged with the enforcement of the laws in question, including laws for the suppression of the liquor traffic with and among the Indians, the said Commissioner of Indian Affairs; and likewise it had been and was the settled usage and practice of the President, in the exercise of his power of extending Executive clemency, to consult the Attorney General; and likewise it had been and was the settled usage and practice of the Attorney General, for the purpose of advising the President on the said subject, to consult with the United States attorney or other officer by whom the prosecution had been conducted.

That then and there, and before any of the aforesaid sentences were enforced or executed, said court held the execution thereof in abeyance in order to give the said persons who had pleaded guilty, as aforesaid, an opportunity to apply to and obtain from the said Commissioner of Indian Affairs said recommendation to the said 5 judge of a reduction or suspension of the said sentences, or a part thereof, and a recommendation from the said United States attorney for a commutation of sentence or other Executive clemency.

That then and there, and at all the times herein mentioned, the Commissioner of Indian Affairs, in the performance of his official duty, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, and as provided by law, was charged with the duties of assisting in the enforcement of the laws of the United States in reference to the liquor traffic affecting Indians, and particularly with the duty, when requested so to do, of advising and making recommendations to any judge before whom any prosecutions on the said subject may have been tried, and the United States attorney or other officer by whom the said prosecution had been conducted, concerning the effect upon the enforcement of the said law, of any proposed leniency or clemency in connection with the punishment of the persons found guilty of offences thereunder.

That then and there and while the said sentences were, as aforesaid, being held in abeyance one Willis N. Birdsall, who was then and there and theretofore had been attorney for the persons who

had pleaded guilty as aforesaid, was desirous of obtaining and intended to seek from the said judge of the said court a reduction or suspension of the said sentences or a part thereof, and was also desirous of obtaining and intended to seek from the President a commutation or other executive clemency of the said sentences, or a part thereof, and to that end was desirous of obtaining and intended to seek from the Commissioner of Indian Affairs, a recommendation to that effect to the said judge and said United States attorney; that then and there one Willis N. Birdsall, who was then and there and theretofore had been attorney for said persons indicted

6 as aforesaid at the April term, 1909, and hereinbefore referred to, did on or about the 30th day of May, in the year 1910, in the district aforesaid, then and there, and within the jurisdiction of said court, unlawfully, willfully, corruptly, and feloniously offer and give and cause to be given the sum of seventy-five dollars, lawful money of the United States of the value of seventy-five dollars, to the said Everett E. Van Wert, he the said Willis N. Birdsall then and there well knowing the said Everett E. Van Wert to be a person acting for and on behalf of the United States in the said official function as aforesaid, under and by authority of the Department of the Interior of the United States as aforesaid, with the intent to influence thereby the decision and action of the said Everett E. Van Wert on a question, matter, cause, and proceeding then and there expected, and intended soon to be pending before him the said Everett E. Van Wert, and then and there expected soon by law to be brought before him, the said Everett E. Van Wert, in his official capacity and in his place of trust and profit, to wit, that is to say, with intent that when the application should be made to his said superior officer, the Commissioner of Indian Affairs, for said recommendation or recommendations for leniency or clemency, and when said Commissioner of Indian Affairs should call upon him, the said Everett E. Van Wert, either directly or through other subordinates of the said commissioner for information, report, advice and recommendation thereon, particularly as to whether the enforcement of the said laws for the suppression of the liquor traffic with and among Indians would be furthered or prejudiced by said clemency or leniency, he, the said Everett E. Van Wert, should thereupon have his decision and action influenced by the receipt by him of the said sum of seventy-five dollars, so that he would falsely and without regard to truth, and contrary to his duty as a person acting on behalf of the United States in an official capacity under and by virtue of the Department of the Interior, mislead and misinform said Commissioner of Indian Affairs, either directly or through other

7 subordinates of the said commissioner, that under the facts and circumstances officially known to him, the said Everett E. Van Wert, leniency and clemency ought to be granted to the said persons, or any of them, who had pleaded guilty as aforesaid, and advise that the said commissioner should in the interest of the enforcement of the said laws for the suppression of the liquor traffic with and

among Indians, recommend to the said judge or to the said United States attorney, or to the said Secretary of the Interior, or to the said Attorney General, or to the said President, that leniency and clemency should be granted to the said persons who had as aforesaid pleaded guilty, or to some of them, so that they should not be placed in prison, but the sentences should be changed and commuted to a fine, without imprisonment, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT Two.

And the grand jurors aforesaid, on their oath aforesaid, do further present that on the 30th day of May in the year 1910, and for more than a year next prior thereto, and during all the dates and times hereinafter mentioned and set forth, in said district and within the jurisdiction of said court, Everett E. Van Wert, was then and there a person acting for and in behalf of the United States in an official capacity, to wit, a deputy special officer for the suppression of the liquor traffic with and among Indians; under and by virtue of the authority of a department of the Government, to wit, the Department of the Interior of the United States, the said Everett E. Van Wert having been theretofore duly and legally appointed such deputy special officer by the Commissioner of Indian Affairs under and by virtue of the authority of the Secretary of the Interior.

8 That in the performance of his official functions as such deputy special officer, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, the said Everett E. Van Wert was then and there charged with the duty and called upon and required among other things to make recommendations to his superior officer, the Commissioner of Indian Affairs, either directly or through other subordinates of the said Commissioner of Indian Affairs, concerning all matters connected with the conviction and punishment of persons who would unlawfully sell liquor to Indians, or otherwise violate the laws of the United States in reference to the liquor traffic affecting the Indians, and to inform and advise the said Commissioner of Indian Affairs, either directly or through other subordinates of the said commissioner, when called upon so to do, in all such matters and in all matters relating thereto, and particularly, when called on so to do, to inform the said commissioner whether or not the effective suppression of the liquor traffic with and among Indians would be furthered or prejudiced by Executive or judicial clemency in any particular case; and in all the said matters and in all matters relating thereto to act without partiality or favor and truthfully and without violating or betraying the confidence and trust reposed in him the said Everett E. Van Wert.

That at the April term of said court in the year 1909, in and for said district, the following named persons, to wit, Charles S. Parker,

William Kascht, Peter Wagner, William Wagner, Carl J. White, Edward Westhoff, P. J. Gosweiller, Leonard Kranz, and Jacob Guyer, were each and all indicted for unlawfully selling liquor to Indians in violation of laws of the United States, and each and all of said persons above named and indicated as aforesaid entered a plea of guilty at the December term in the year 1909 of said court

to the offences charged in said indictment, and each of said
9 persons who were indicted and entered a plea of guilty as
aforesaid were sentenced by said court at the April term, in
the year 1910, to pay a fine of one hundred dollars and be impris-
oned for a period of sixty days.

That before any of the aforesaid sentences were enforced or ex-
ecuted an application was made to the judge of the said court for a
reduction of the sentences and for a suspension thereof, or part
thereof; and also it was stated on behalf of the said persons who had
pleaded guilty that an effort would be made to obtain a commutation
of the said sentences by Executive action.

That then and there the judge of the said court announced that
he would not change or reduce or suspend the said sentences or any
part thereof unless a recommendation to that effect was made to him
by the said Commissioner of Indian Affairs; and the United States
attorney in the aforesaid district announced that he would not recom-
mend a commutation or other Executive clemency unless a recom-
mendation to that effect was made to him by the said Commissioner
of Indian Affairs.

That then and there, and during all the dates and times herein
mentioned, it was and long had been the settled usage and practice
for the United States judges in determining upon sentences and
upon the application for changes, reductions, or suspensions thereof,
to consult the United States attorney and either directly or through
him the administrative officer charged with the enforcement of the
laws in question, including laws for the suppression of the liquor
traffic with and among the Indians, the said Commissioner of Indian
Affairs; and likewise it had been and was the settled usage and
practice of the President, in the exercise of his power of extending
Executive clemency, to consult the Attorney General; and likewise it
had been and was the settled usage and practice of the Attorney Gen-
eral, for the purpose of advising the President on the said
10 subject, to consult with the United States attorney or other
officer by whom the prosecution had been conducted.

That then, and there, and before any of the aforesaid sentences
were enforced or executed, said court held the execution thereof in
abeyance in order to give the said persons who had pleaded guilty,
as aforesaid, an opportunity to apply to and obtain from the said
Commissioner of Indian Affairs said recommendation to the said
judge of a reduction or suspension of the said sentences or a part
thereof and a recommendation from the said United States attorney
for a commutation of sentence or other Executive clemency.

That then and there, and at all the times herein mentioned, the Commissioner of Indian Affairs, in the performance of his official duty, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior and as provided by law, was charged with the duties of assisting in the enforcement of the laws of the United States in reference to the liquor traffic affecting the Indians, and particularly with the duty, when requested so to do, of advising and making recommendations to any judge before whom any prosecutions on the said subject may have been tried and the United States attorney or other officer by whom the said prosecution had been conducted concerning the effect upon the enforcement of the said law of any proposed leniency or clemency in connection with the punishment of the persons found guilty of offences thereunder.

That then and there, and while the said sentences were, as aforesaid, being held in abeyance, one Willis N. Birdsall, who was then and there and theretofore had been attorney for the persons who had pleaded guilty as aforesaid, was desirous of obtaining and intended to seek from the said judge of the said court a reduction or suspension of the said sentences, or a part thereof, and was also desirous of obtaining and intended to seek from the President a commutation or other Executive clemency of the said sentences, or

a part thereof, and to that end was desirous of obtaining and intended to seek from the Commissioner of Indian Affairs a recommendation to that effect to the said judge and said United States attorney; that then and there one Willis N. Birdsall, who was then and there and theretofore had been attorney for said persons indicted as aforesaid at the April term, 1909, and hereinbefore referred to, did, on or about the 30th day of May, in the year 1910, in the district aforesaid, then and there, and within the jurisdiction of said court, unlawfully, willfully, corruptly, and feloniously offer and give and cause to be given the sum of seventy-five dollars, lawful money of the United States of the value of seventy-five dollars, to the said Everett E. Van Wert, he, the said Willis N. Birdsall, then and there well knowing the said Everett E. Van Wert to be a person acting for and on behalf of the United States in the said official function as aforesaid, under and by authority of the Department of the Interior of the United States as aforesaid, with the intent to influence thereby the decision and action of the said Everett E. Van Wert on a question, matter, cause, and proceeding then and there expected and intended soon to be pending before him, the said Everett E. Van Wert, and then and there expected soon by law to be brought before him, the said Everett E. Van Wert, in his official capacity and in his place of trust and profit, to wit; that is to say, with intent that when the application should be made to his said superior officer, the Commissioner of Indian Affairs, for said recommendation or recommendations for leniency or clemency, and when said Commissioner of Indian Affairs should call upon him, the said Everett E. Van Wert, either directly or through other subordinates of the commissioner, for

information, report, advice, and recommendation thereon, particularly as to whether the enforcement of the said laws for the suppression of the liquor traffic with and among Indians would be furthered or prejudiced by said clemency or leniency, he, the said Everett E. Van Wert, should thereupon have his decision and action influenced by the receipt by him of the said sum of seventy-five dollars, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

H. J. BONE,

*Special Assistant to the United States Attorney
for the Northern District of Iowa.*

(Endorsed:) No. 4164. District Court of the United States, Eastern Division of the Northern District of Iowa. The United States vs. Willis N. Birdsall. Indictment, bribery of Van Wert. Sec. 39, Criminal Code. Penalty, fine not more than three times amount of money involved and imprisonment not more than three years. A true bill. G. M. Bigelow, foreman. Presented in open court by the foreman of the grand jury in the presence of said grand jury and filed by me this 4th day of December, A. D. 1912. A. J. Van Duzee, clerk; M. L. Norman, deputy.

13 UNITED STATES OF AMERICA
v.s.
WILLIS N. BIRDSALL. } No. 4165. Presentment, bill of
indictment.

Now this 4th day of December, 1912, the grand jury in and for the United States District Court, in and for the Northern District of Iowa, heretofore duly empanelled, came into court and by their foreman, presented to the court a true bill of indictment against Willis N. Birdsall, charging him with the crime of unlawfully and knowingly offering a bribe to an officer of the United States, to wit, a special officer of the Department of Indian Affairs, viz, Thomas E. Brents, committed within the jurisdiction of this court; whereupon, on motion of H. J. Bone, special attorney of the United States,

It is ordered by the court that said indictment be received and filed; thereupon the same was duly endorsed by the clerk as follows:
Presented in open court by the foreman of the grand jury in presence of said grand jury and filed by me this 4th day of December, 1912.

Said bill of indictment is in words and figures following, to wit:

14 The bill of indictment returned against defendant, Willis N. Birdsall, in case No. 4165, with which the cause No. 4164 was consolidated, is in words and figures following, to wit:

UNITED STATES OF AMERICA,

Eastern Division of the Northern District of Iowa, 88:

In the District Court of the United States in and for the district aforesaid, at the December term thereof, A. D. 1912.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, in the court aforesaid, on their oath present and charge, that on the 30th day of April in the year 1910, and for more than a year next prior thereto, and during all the dates and times hereinafter mentioned and set forth, in said district and within the jurisdiction of said court, Thomas E. Brents was then and there a person acting for and in behalf of the United States in an official capacity, to wit, a special officer for the suppression of the liquor traffic with and among Indians; under and by virtue of the authority of a department of the Government, to wit, the Department of the Interior of the United States, the said Thomas E. Brents having been theretofore duly and legally appointed such special officer by the Commissioner of Indian Affairs, under and by virtue of the authority of the Secretary of the Interior.

That in the performance of his official functions as such special officer as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, the said Thomas E. Brents was then and there charged with the duty and called upon and required, among other things, to make recommendations to his said superior officer, the Commissioner of

Indian Affairs, either directly or through other subordinates of
15 the said Commissioner of Indian Affairs, concerning all mat-

ters connected with the conviction and punishment of persons who should unlawfully sell liquor to Indians, or otherwise violate the laws of the United States in reference to the liquor traffic affecting the Indians, and to inform and advise the said Commissioner of Indian Affairs, either directly or through other subordinates of said commissioner when called on so to do, in all such matters and in all matters relating thereto, and particularly, when called on so to do, to inform the said commissioner whether or not the effective suppression of the liquor traffic with and among Indians would be furthered or prejudiced by Executive or judicial clemency in any particular case; and in all the said matters and in all matters relating thereto to act without partiality or favor and truthfully and without violating or betraying the confidence and trust reposed in him, the said Thomas E. Brents.

That at the April term of said court, in the year 1909, in and for said district, the following-named persons, to wit, Charles S. Parker, William Kascht, Peter Wagner, William Wagner, Carl J. White, Edward Westhoff, P. J. Goswiller, Leonard Krantz, and Jacob Guyer, were each and all indicted for unlawfully selling liquor to Indians, in violation of laws of the United States, and each and all of said persons above named and indicted as aforesaid entered a plea of guilty at the December term, in the year 1909, of said court to the offences charged in said indictment, and each of said persons who were indicted and entered a plea of guilty as aforesaid were sentenced by said court at the April term, in the year 1910, to pay a fine of one hundred dollars and be imprisoned for a period of sixty days.

That before any of the aforesaid sentences were enforced or executed an application was made to the judge of the said court for a reduction of the sentences and for a suspension thereof or part thereof, and also it was stated on behalf of the said persons who had pleaded guilty that an effort would be made to obtain a commutation of the said sentences by executive action.

16 That then and there the judge of the said court announced that he would not change or reduce or suspend the said sentences or any part thereof unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs; and the United States attorney in the aforesaid district announced that he would not recommend a commutation or other executive clemency unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs.

That then and there, and during all the dates and times herein mentioned, it was and long had been the settled usage and practice for the United States judges in determining upon sentences and upon the applications for changes, reductions, or suspensions thereof to consult the United States attorney, and either directly or through him the administrative officer charged with the enforcement of the laws in question, including laws for the suppression of the liquor traffic with and among the Indians, to said Commissioner of Indian Affairs; and likewise it had been and was the settled usage and practice of the President, in the exercise of his power of extending executive clemency, to consult the Attorney General; and likewise it had been and was the settled usage and practice of the Attorney General, for the purpose of advising the President on the said subject, to consult with the United States attorney or other officer by whom the prosecution had been conducted.

That then and there, and before any of the aforesaid sentences were enforced or executed, said court held the execution thereof in abeyance in order to give the said persons who had pleaded guilty as aforesaid an opportunity to apply to and obtain from the said Commissioner of Indian Affairs said recommendation to the said judge of a reduction or suspension of the said sentences or a part thereof, and a recommendation from the said United States 17 attorney for a commutation of sentence or other executive clemency.

That then and there and at all the times herein mentioned the Commissioner of Indian Affairs, in the performance of his official duty, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, and as provided by law, was charged with the duties of assisting in the enforcement of the laws of the United States in reference to the liquor traffic affecting Indians, and particularly with the duty, when requested so to do, of advising and making recommendations to any judge before whom any prosecutions on the said subject may have been tried, and the United States attorney, or other officer by whom the said prosecution had been conducted, concerning the effect

upon the enforcement of the said law, of any proposed leniency or clemency in connection with the punishment of persons found guilty of offences thereunder.

That then and there and while the said sentences were, as aforesaid, being held in abeyance one Willis N. Birdsall, who was then and there and theretofore had been attorney for the persons who had pleaded guilty as aforesaid, was desirous of obtaining and intended to seek from the said judge of the said court a reduction or suspension of the said sentences or a part thereof, and was also desirous of obtaining and intended to seek from the President a commutation or other executive clemency of the said sentences, or a part thereof, and to that end was desirous of obtaining and intended to seek from the Commissioner of Indian Affairs, a recommendation to that effect to the said judge and said United States attorney; that then and there one Willis N. Birdsall, who was then and there and theretofore had been attorney for said persons indicted as aforesaid at the April term 1909, and hereinbefore referred to, did on or about the 30th day of April, in the year 1910, in the district aforesaid,

then and there, and within the jurisdiction of said court, unlawfully, willfully, corruptly, and feloniously offer and give and cause to be given the sum of fifty dollars, lawful money of the United States of the value of fifty dollars, to the said Thomas E. Brents, he the said Willis N. Birdsall then and there well knowing the said Thomas E. Brents to be a person acting for and on behalf of the United States in the said official function as aforesaid, under and by authority of the Department of the Interior of the United States as aforesaid, with the intent to influence thereby the decision and action of the said Thomas E. Brents on a question, matter, cause and proceeding then and there expected and intended soon to be pending before him the said Thomas E. Brents, and then and there expected soon by law to be brought before him, the said Thomas E. Brents, in his official capacity and in his place of trust and profit, to-wit, that is to say with intent that when the application should be made to his said superior officer, the Commissioner of Indian Affairs, for said recommendation or recommendations for leniency or clemency, and when said Commissioner of Indian Affairs should call upon him, the said Thomas E. Brents, either directly or through other subordinates of the said commissioner, for information, report, advice, and recommendation hereon, particularly as to whether the enforcement of the said laws for the suppression of the liquor traffic with and among Indians would be furthered or prejudiced by said clemency or leniency, he, the said Thomas E. Brents, should thereupon have his decision and action influenced by the receipt by him of the said sum of fifty dollars, so that he would falsely and without regard to truth and contrary to his duty as a person acting on behalf of the United States in his official capacity under and by virtue of the Department of the Interior, mislead and misinform said

Commissioner of Indian Affairs, either directly or through other subordinates of the said Commissioner, that under the

facts and circumstances officially known to him, the said Thomas E. Brents, leniency and clemency ought to be granted to the said persons, or any of them, who had pleaded guilty as aforesaid, and advise that the said commissioner should in the interest of the enforcement of the said laws for the suppression of the liquor traffic with and among Indians, recommend to the said judge or to the said United States attorney, or to the said Secretary of the Interior, or to the said Attorney General, or to the said President, that leniency and clemency should be granted to the said persons who had as aforesaid pleaded guilty, or to some of them, so that they should not be placed in prison but the sentences should be changed and commuted to a fine without imprisonment; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT Two.

And the grand jurors aforesaid, on their oath aforesaid, do further present that on the 30th day of April, 1910, and for more than a year prior thereto, and during all the dates and times hereinafter mentioned and set forth, in said district and within the jurisdiction of said court Thomas E. Brents was then and there a person acting for and in behalf of the United States in an official capacity, to wit, special officer for the suppression of the liquor traffic with and among Indians; under and by virtue of the authority of a department of the Government, to wit, the Department of the Interior of the United States, the said Thomas E. Brents having been theretofore duly and legally appointed such special officer by the Commissioner of Indian Affairs under and by virtue of the authority of the

Secretary of the Interior.

20 That in the performance of his official functions as such special officer, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, the said Thomas E. Brents was then and there charged with the duty and called upon and required among other things to make recommendations to his said superior officers. The Commissioner of Indian Affairs, either directly or through other subordinates of the said Commissioner of Indian Affairs, concerning all matters connected with the conviction and punishment of persons who would unlawfully sell liquor to Indians or otherwise violate the laws of the United States in reference to the liquor traffic affecting the Indians, and to inform and advise the said Commissioner of Indian Affairs, either directly or through other subordinates of said commissioner when called on so to do, in all such matters and in all matters relating thereto, and particularly, when called on so to do, to inform the said commissioner whether or not the effective suppression of the liquor traffic with and among Indians would be furthered or prejudiced by executive or judicial clemency in any particular case, and in all the said matters and in all matters re-

lating thereto to act without partiality or favor and truthfully and without violating or betraying the confidence and trust reposed in him, the said Thomas E. Brents.

That at the April term of said court, in the year 1909, in and for said district the following-named persons, to wit, Charles S. Parker, William Kascht, Peter Wagner, William Wagner, Carl J. White, Edward Westhoff, P. J. Gosweiller, Leonard Krantz, and Jacob Guyer, were each and all indicted for unlawfully selling liquor to Indians, in violation of laws of the United States, and each and all of said persons above named and indicted as aforesaid entered a plea of guilty at the December term, in the year 1909, of said court to the offences charged in said indictment, and each of said persons

21 who were indicted and entered a plea of guilty as aforesaid were sentenced by said court at the April term, in the year 1910, to pay a fine of one hundred dollars and be imprisoned for a period of sixty days.

That before any of the aforesaid sentences were enforced or executed an application was made to the judge of the said court for a reduction of the sentences and for a suspension thereof or part thereof, and also it was stated on behalf of the said persons who had pleaded guilty that an effort would be made to obtain a commutation of the said sentences by executive action.

That then and there the judges of the said court announced that he would not change or reduce or suspend the said sentences or any part thereof, unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs; and the United States attorney in the aforesaid district announced that he would not recommend a commutation, or other executive clemency, unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs.

That then and there and during all the dates and times herein mentioned it was and long had been the settled usage and practice for the United States judges in determining upon sentences and upon the application for changes, reductions or suspensions thereof, to consult the United States attorney, and either directly or through him the administrative officer charged with the enforcement of the laws in question, including laws for the suppression of the liquor traffic with and among the Indians, the said Commissioner of Indian Affairs; and likewise it had been and was the settled usage and practice of the President in the exercise of his power of extending executive clemency to consult the Attorney General; and likewise it had been and was the settled usage and practice of the Attorney General for the purpose of advising the President on the said subject to consult with the United States attorney or other officer by whom the prosecution had been conducted.

22 That then and there, and before any of the aforesaid sentences were enforced or executed, said court held the execution thereof in abeyance in order to give the said persons who had pleaded guilty, as aforesaid, an opportunity to apply to and obtain from the

said Commissioner of Indian Affairs said recommendation to the said judge of a reduction or suspension of the said sentences or a part thereof, and a recommendation from the said United States attorney for a commutation of sentence or other executive clemency.

That then and there and at all the times herein mentioned the Commissioner of Indian Affairs, in the performance of his official duty, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, and as provided by law, was charged with the duties of assisting in the enforcement of the laws of the United States in reference to the liquor traffic affecting Indians, and particularly with the duty when requested so to do, of advising and making recommendations to any judge before whom any prosecutions on the said subject may have been tried, and the United States attorney or other officer, by whom the said prosecution had been conducted, concerning the effect upon the enforcement of the said law, of any proposed leniency or clemency in connection with the punishment of the persons found guilty of offences thereunder.

That then and there and while the said sentences were, as aforesaid, being held in abeyance one Willis N. Birdsall, who was then and there and theretofore had been attorney for the persons who had pleaded guilty as aforesaid, was desirous of obtaining and intended to seek from the said judge of the said court a reduction or suspension of the said sentences or a part thereof and was also desirous of obtaining and intended to seek from the President a commutation

or other Executive clemency of the said sentences, or a part
23 thereof, and to that end was desirous of obtaining and intended

to seek from the Commissioner of Indian Affairs a recommendation to that effect to the said judge and said United States attorney; that then and there one Willis N. Birdsall, who was then and there and theretofore had been attorney for said persons indicted as aforesaid at the April term, 1909, and hereinbefore referred to, did on or about the 30th day of April, 1909, in the district aforesaid, then and there and within the jurisdiction of said court, unlawfully, willfully, corruptly, and feloniously offer and give and cause to be given the sum of fifty dollars, lawful money of the United States of the value of fifty dollars, to the said Thomas E. Brents, he, the said Willis N. Birdsall, then and there well knowing the said Thomas E. Brents to be a person acting for and on behalf of the United States in the said official function as aforesaid, under and by authority of the Department of the Interior of the United States as aforesaid, with the intent to influence thereby the decision and action of the said Thomas E. Brents on a question, matter, cause, and proceeding then and there expected and intended soon to be pending before him, the said Thomas E. Brents, and then and there expected soon by law to be brought before him, the said Thomas E. Brents, in his official capacity and in his place of trust and profit, to wit, that is to say, with intent that when the application should be made to his said superior officer, the Commissioner of Indian Affairs, for said recom-

mendation or recommendations for leniency or clemency, and when said Commissioner of Indian Affairs should call upon him, the said Thomas E. Brents, either directly or through other subordinates of the said commissioner, for information, report, advice, and recommendation thereon, particularly as to whether the enforcement of the said laws for the suppression of the liquor traffic with and among Indians would be furthered or prejudiced by said clemency or leniency, he, the said Thomas E. Brents, should thereupon have his decision and action influenced by the receipt by him of the said sum of fifty dollars, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

24
H. J. BONE,
*Special Assistant to the United States Attorney
for the Northern District of Iowa.*

(Endorsed:) No. 4165. District Court of the United States, Northern District of Iowa, Eastern Division. The United States vs. Willis N. Birdsall. Indictment, bribery of Thomas E. Brents. Sec. 39, Criminal Code. Penalty, fine not more than three times amount of money involved and imprisoned not more than three years. A true bill. G. M. Bigelow, foreman. Presented in open court by the foreman of the grand jury in the presence of the grand jury and filed by me this 4th day of December, 1912. A. J. Van Duzee, clerk. M. L. Norman, deputy.

And on the 22nd day of April, 1913, the following motion to consolidate was filed in the office of the clerk of said court, to wit:

25 In the United States District Court, Northern District of Iowa, Eastern Division.

THE UNITED STATES, PLAINTIFF, ^{v.s.} W. N. BIRDSSL, DEFENDANT,	No. 4164. Motion.
---	-------------------

DIVISION I.

Comes now the defendant in the above-entitled cause and moves the court that the said cause be joined and consolidated with No. 4165, being a cause entitled "The United States vs. W. N. Birdsall," which said cause is now pending in this court, upon the following ground, to wit:

1st. That the same defendant appears and is charged with the same alleged offenses or those of like nature in each of said actions and the indictments therein returned.

2nd. That the alleged offenses charged in each of said actions and in the indictments returned therein grow out of the same transaction and involve similar alleged offenses and of the same class and of like nature, and should properly be charged in separate counts of one indictment.

3rd. That the witnesses to be produced and the evidence to be offered or introduced in the trial of each of said actions is the same, or substantially the same, and said actions can be and should be tried to one jury.

4th. That by the joinder and consolidation of said causes the expense thereof to the United States and to the defendant upon trial thereof will be materially lessened, the time consumed in said trial materially reduced, a multiplicity of actions avoided, and the ends of justice fully subserved.

DIVISION II.

The defendant in the above-entitled cause further moves the court that the special United States district attorney and the clerk of said United States District Court be required to furnish this defendant a copy of the minutes of the testimony taken before the grand jury which returned the indictment in said cause, together with the names of all witnesses who testified before the grand jury and all written or documentary evidence that was offered, introduced, or presented at the hearing before said grand jury, upon the following grounds, to wit:

1st. That this defendant is not able to properly present his defense to the said charge made unless copies of such minutes of the testimony and list of witnesses shall be furnished, for the reason that a large number of witnesses were examined and a large amount of written and documentary evidence was introduced, and for the further reason that it may become necessary to meet or explain the evidence so introduced to procure the depositions of witnesses at a distance from the place of trial of said cause, to wit, it may be necessary to procure the deposition of the then Acting Assistant Attorney General, J. A. Fowler; that of the then Acting Commissioner of Indian Affairs, Robert C. Valentine; of the then acting pardon attorney or clerk, _____ Finch, and other witnesses who are widely scattered and at a great distance from the place of trial.

2nd. That it is impossible to determine whether such witnesses will be required or their depositions need to be taken unless this defendant is furnished with the list of witnesses, the minutes of the testimony, and copies of the written and documentary evidence introduced before said grand jury.

3rd. That it would be impossible upon the trial of this cause without having copies of the minutes of the testimony and of the written and documentary evidence to properly meet the issues presented and to properly prepare and make defense to the 27 charges in said indictment, for the reason that defendant would be unable at that time to procure the attendance of material witnesses upon material questions involved in the hearing of said cause or procure their depositions.

DIVISION III.

The defendant moves the court that said cause if consolidated or said causes No. 4164 and 4165, if not consolidated, be transferred to

the Waterloo division for trial for the reason that a large number of the witnesses reside in or near the city of Waterloo and that said cause is properly triable in said division and can be tried in said division at much less expense to the United States and to the defendant that if tried at the Dubuque division.

H. B. BOIES, and
CHARLES W. MULLAN,
Attorneys for Defendant.
W. N. BIRDSALL—per se.

Filed April 22, 1913. Lee McNeely, clerk.

And afterwards, to wit, on the 24th day of April, 1913, the following proceedings were had by said court in said cause, as appears of record on page 124 of Minutes N of said court, to wit:

UNITED STATES OF AMERICA <i>vs.</i> WILLIS N. BIRDSALL.	No. 4164.
---	-----------

Now this 24th day of April, 1913, this cause comes before the court in open session, upon motion of W. N. Birdsall, defendant, for an order consolidating this cause with cause No. 4165, United States of America vs. Willis N. Birdsall, and the court being fully advised, it is ordered that this cause be and the same is hereby consolidated with cause No. 4165, United States vs. Willis N. Birdsall.

It is further ordered by the court that if the defendant desires to demur to the indictment in this cause thus consolidated, he shall do so by April 28, 1913, and the demurrer, if filed within said time, is set for hearing by oral argument before the United States District Court at Waterloo, on May 13, 1913, at 10 a. m.

It is further ordered by the court that the clerk of this court notify defendant herein, also the special assistant United States attorney, H. J. Bone, by mailing to each a certified copy of this order.

And on the 28th day of April, 1913, there was filed in the office of the clerk of said court, a demurrer to the indictment, which is in words and figures following, to wit:

In the District Court of the United States, Northern District of Iowa, Eastern Division.

THE UNITED STATES, PLAINTIFF, <i>vs.</i> W. N. BIRDSALL, DEFENDANT.	No. 4164. Demurrer to indictment.
---	-----------------------------------

Comes now the defendant in the above-entitled action and demurs to the indictment returned by the grand jury herein upon the following grounds:

I.

That the facts stated and set forth in said indictment do not constitute any crime or offense under the Constitution and laws of
29 the United States.

II.

That the facts set forth in said indictment do not charge the defendant with the offense of bribery, or with any other offense whatsoever, and wholly fails to set forth or allege any facts which constitute any offense or crime under the Constitution and laws of the United States, or the regulations, practices, and established usages of any department of the Government, in this, to wit:

First. That said indictment fails to charge, allege, or set forth that the said Everett E. Van Wert was an officer of the Government of the United States, or that he was a person acting for or on behalf of the United States in an official function, or that he was acting by authority of any department or office of the Government thereof at the time of the alleged payment of money to him by the defendant, and that said indictment wholly fails to charge defendant with giving or offering to give to the said Everett E. Van Wert any money or other thing of value, with intent to influence the said Everett E. Van Wert while acting in any official function or under or by authority of any department or office of the Government.

Second. That said indictment wholly fails to charge, allege, or set forth that any matter, question, cause, or proceeding was pending before the said Van Wert in his official function, or before him as an officer of the United States, or as a person acting for or in behalf of the United States in any official function, or as a person acting under or by authority of any department or office of the Government of the United States at the time of the alleged act of the defendant, which is charged as bribery in said indictment, and affirmatively shows that no question, matter, cause, or proceeding was pending before the said Everett E. Van Wert in his official capacity, and that no question, matter, cause, or proceeding had by law been brought before him, or was pending before him at the time of
30 the alleged payment of money by the defendant to him, the said Everett E. Van Wert.

Third. That said indictment wholly fails to allege, set forth, or charge that under any existing regulations of any department of the Government or under any settled practice or usage of any department thereof, it was the custom, practice, or usage of any administrative or judicial officer of the Government to consult the said Everett E. Van Wert as to the reduction or suspension of any sentence, judgment, or penalty imposed or rendered by any judge of the United States upon any person or persons for a violation of the laws relating to the suppression of the sale of intoxicating liquors to and among the Indians, and wholly fails to allege, set forth, or charge that it was

the duty of the said Van Wert, under any existing regulation or under any established practice or usage of any department of the Government, to recommend or advise the President of the United States, the Secretary of the Interior, the Attorney General, any judge of the United States, any United States attorney, or the Commissioner of Indian Affairs as to any sentence imposed upon any person or persons found guilty of violating the laws relating to the sale of intoxicating liquors to Indians or as to extending any judicial clemency to such person or persons, and that such indictment wholly fails to charge that in receiving the money alleged to have been paid to the said Van Wert by the defendant, that said payment was received by the said Van Wert or made by the defendant for the purpose and with intent to influence the decision of the said Van Wert in any matter which he was required to decide, or which it was his duty to decide under the Constitution and laws of the United States or under any regulation or established practice or usage of any department of the Government.

Fourth. That said indictment wholly fails to set forth or show that it was any part of the official duty of the said Everett E. 31 . Van Wert to advise the United States District Court or any judge thereof or to recommend to such court or judge any change, reduction, or suspension of any sentence imposed upon any person or persons found guilty of a violation of the laws of the United States relating to the sale of intoxicating liquors to Indians, or to advise or recommend judicial clemency to any court of the United States or to any judge thereof in fixing and determining any sentence and punishment imposed by such court or judge upon a conviction of a violation of such laws.

Fifth. That said indictment affirmatively shows that the said Everett E. Van Wert was an employee of a department of the United States Government wholly separate and distinct from that of the courts of the United States, to wit, the Department of the Interior, and that no authority was conferred upon him by the Constitution and laws of the United States, and that no duty was imposed upon him by the Constitution or laws of the United States or by any regulations, usages, or practices of any department of the United States to advise any court of the United States, or any judge thereof, as to any change, reduction, or suspension of any sentence imposed upon any person for a violation of the laws of the United States relating to the sale of intoxicating liquors to Indians, or to advise or recommend to any such court or judge, judicial clemency in fixing or determining any sentence or punishment imposed by such court or judge upon any person or persons convicted of a violation of said laws and it further affirmatively appears upon the face of said indictment that the said Van Wert had no power or authority to act upon or to determine or decide as to any change, reduction, or suspension of any sentence imposed by any court of the United States, or by any judge thereof, upon any person convicted of any violation of the laws of the United States, or to decide or determine whether judicial clem-

ency should be extended to any such person or persons so convicted. And that the courts of the United States or the judges thereof were not bound or obligated to receive, accept, carry out, or act upon any recommendation or advice of the said Van Wert which he might make or give as to any sentence imposed or any judicial clemency extended as to any person found guilty of violating said laws.

Sixth. That said indictment upon its face, further affirmatively shows that any attempt upon the part of the said Van Wert to suggest or recommend to the courts of the United States, or to the judges thereof, what any action upon the part of such courts should be as to imposing sentences upon any person or persons found guilty of violating the laws relating to the sale of intoxicating liquors to Indians would be an act on part of the said Van Wert wholly outside of and beyond any official power, function or duty of the said Van Wert as a special officer of the Department of the Interior, and that such courts or judges thereof would be under no obligation whatever, legal or moral, to listen to or follow any such suggestion, recommendation or advice or to be governed thereby in fixing any sentence imposed upon any person or persons by such courts for the violation of the laws relating to the sale of intoxicating liquors to Indians or in extending to such person or persons any judicial clemency, and that any recommendation, suggestion, or advice of the said Van Wert so given or attempted to be given to said courts or judges would be a recommendation, suggestion, or the advice of the said Van Wert as a private person, and in his character as a private citizen and not as an officer of the Government or of any department thereof. That no such recommendation, suggestion, or advice could be given by

the said Van Wert while acting for or in behalf of the
33 United States in any official function, or by authority of any department or office of the Government thereof, for the reason that such action on the part of the said Van Wert would be an attempt upon the part of an employe of one branch of the Government to unlawfully influence the action of an officer of a coordinate branch of such Government and would be contrary to and in violation of public policy and the long-established usages of the respective departments of the Government of the United States.

Seventh. That said indictment wholly fails to set forth or charge that the money alleged to have been paid by the defendant to the said Van Wert was paid by the defendant with the intent on the part of said defendant of influencing the said Van Wert in his decision or in his action of or upon any question, matter, cause or proceeding which was at that time pending or which had been by law brought before him, the said Van Wert, in his official capacity or in his place of trust or profit, or with intent to influence him, the said Van Wert, to commit or aid in committing or to collude in or allow any fraud, or permit any opportunity for the commission of any fraud upon the United States, or to induce him to do, or omit to do any act in violation of his lawful duty. And said indictment affirmatively shows upon its face that the money alleged to have been paid by the de-

fendant to the said Van Wert was not paid by the defendant to said Van Wert with the intent on the part of said defendant to influence the said Van Wert in his decision or action on or as to any question, matter, cause or proceeding which was pending before him, the said Van Wert, or which had been by law brought before him in his official capacity or function, or in his place of trust and profit, as to which the said Van Wert had jurisdiction, or as to which the said Van Wert had any power or authority to decide, or upon which the said Van Wert had any power or authority to decide, or
34 upon which the said Van Wert had any power or authority, directly or indirectly, in any manner to act; or with intent to influence him, the said Van Wert, to commit or aid in committing, or to collude in or allow any fraud, or permit any opportunity for the commission of any fraud upon the United States, or to induce him to do, or omit to do any act in violation of his lawful duty. And said indictment affirmatively shows upon its face that the money alleged to have been paid by the defendant to the said Van Wert was not paid by the defendant to said Van Wert with the intent on the part of said defendant to influence the said Van Wert in his decision or action on or as to any question, matter, cause or proceeding which was pending before him, the said Van Wert, or which had been by law brought before him in his official capacity or function, or in his place of trust and profit, as to which the said Van Wert had jurisdiction, or as to which the said Van Wert had any power or authority to decide, or upon which the said Van Wert had any power or authority, directly or indirectly, in any manner to act; or with intent to influence him, the said Van Wert, to commit or aid in committing, or to collude in or allow any fraud, or to make any opportunity for the commission of any fraud on the United States or to induce him to do, or omit to do any act in violation of his lawful duty.

H. B. BOIES and
CHARLES W. MULLAN,
Attorneys for Defendant.

Filed April 28, 1913. Lee McNeely, clerk.

35 And on the 18th day of August, 1913, the following opinion was filed in the cases Nos. 4164, 4165, 4166, and 4167, one opinion covering each of said cases, to wit:

United States District Court, Northern District of Iowa, Eastern Division.

UNITED STATES vs. W. N. BIRDSALL.	} Nos. 4164 and 4165 consolidated.
UNITED STATES vs. THOMAS E. BRENTS.	
	} No. 4166.

UNITED STATES
vs.
EVERETT E. VAN WERT. | No. 4167.

Submitted on the demurrer of each defendant, respectively, to the indictment against him.

HARRY J. BONE, special assistant United States attorney, for the United States in each case.

CHARLES W. MULLAN and H. B. BOIES, of Waterloo, Iowa, for the defendant Birdsall; S. C. HUBER, for the defendants Brents and Van Wert.

REED, district judge.

36 At a former term of this court separate indictments were found and returned against the several defendants; those against Thomas E. Brents and Everett E. Van Wert charged them, respectively, with having accepted a bribe from the defendant Birdsall, in violation of sec. 117 of the Penal Code, and those against the defendant Birdsall with having given to said Brents and Van Wert, respectively, a bribe in violation of sec. 39 of the Penal Code. To these indictments each defendant separately demurred, upon the ground that the indictment against him charged no offense. These demurrs were sustained and the indictments dismissed. United States vs. Van Wert, 195 Fed., 974 and 980; and reference is made to the opinion in those cases for the charge in each of the indictments, the several demurrs thereto, and the grounds of the decision.

After the ruling upon the demurrs to those indictments the Government resubmitted to another grand jury the same matters charged therein and procured a new indictment against each of the defendants for the same alleged offense charged in the former indictment against him. To the new indictments each defendant respectively demurs upon the same ground that he demurred to the former indictment against him.

The new or second indictments against Brents and Van Wert are identical, except in the name of the defendants and the amount of the bribe alleged to have been received by each. Omitting the formal parts, that against Brents charges:

"That on the 30th day of April, in the year 1910, and for more than a year next prior thereto, and during all the dates and times hereinafter mentioned and set forth, in said district and within the jurisdiction of said court, Thomas E. Brents was then and there

37 a person acting for and in behalf of the United States in an official capacity, to wit, a special officer for the suppression of the liquor traffic with and among Indians, under and by virtue of the authority of a department of the Government, to wit, the Department of the Interior of the United States, the said Thomas E. Brents having been theretofore duly and legally appointed such special officer by the Commissioner of Indian Affairs under and by virtue of the authority of the Secretary of the Interior.

"That in the performance of his official functions as such special officer, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, the said Thomas E. Brents was then and there charged with the duty and called upon and required among other things to make recommendations to his said superior officer, the Commissioner of Indian Affairs, either directly or through other subordinates of the said Commissioner of Indian Affairs, concerning all matters connected with the conviction and punishment of persons who should unlawfully sell liquor to Indians or otherwise violate the laws of the United States in reference to the liquor traffic affecting the Indians, and to inform and advise the said Commissioner of Indian Affairs, either directly or through other subordinates of said commissioner, when called on so to do, in all such matters and in all matters relating thereto, and particularly when called on so to do to inform the said commissioner whether or not the effective suppression of the liquor traffic with and among Indians would be furthered or prejudiced by Executive or judicial clemency in any particular case, and in all the said matters, and in all matters relating thereto, to act without partiality or favor and truthfully and without violating or betraying the confidence and trust reposed in him, the said Thomas E. Brents.

"That at the April term of said court, in the year 1909, in and for said district, the following-named persons, to wit (naming them), were each and all indicted for unlawfully selling liquor to

38 Indians in violation of laws of the United States, and each and all of said persons above named and indicted as aforesaid entered a plea of guilty at the December term, in the year 1909, of said court to the offenses charged in said indictment, and each of said persons who were indicted and entered a plea of guilty as aforesaid were sentenced by said court at the April term, in the year 1910, to pay a fine of one hundred dollars and be imprisoned for a period of sixty days.

"That before any of the aforesaid sentences were enforced or executed an application was made to the judge of the said court for a reduction of the sentences and for a suspension thereof or part thereof, and also it was stated on behalf of the said persons who had pleaded guilty that an effort would be made to obtain a commutation of the said sentences by Executive action.

"That then and there the judge of the said court announced that he would not change or reduce or suspend the said sentences or any part thereof unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs; and the United States attorney in the aforesaid district announced that he would not recommend a commutation or other Executive clemency unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs.

"That then and there, and during all the dates and times herein mentioned, it was and long had been the settled usage and practice

for the United States judges in determining upon sentences and upon the application for changes, reductions, or suspensions thereof to consult the United States attorney, and either directly or through him the administrative officer charged with the enforcement of the laws in question, including laws for the suppression of the liquor traffic with and among the Indians, the said Commissioner of Indian Affairs; and likewise it had been and was the settled usage and

39 practice of the President, in the exercise of his power of extending Executive clemency, to consult the Attorney General;

and likewise it had been and was the settled usage and practice of the Attorney General, for the purpose of advising the President on the said subject, to consult with the United States attorney or other officer by whom the prosecution had been conducted.

"That then and there, and before any of the aforesaid sentences were enforced or executed, said court held the execution thereof in abeyance in order to give the said persons who had pleaded guilty, as aforesaid, an opportunity to apply to and obtain from the said Commissioner of Indian Affairs said recommendation to the said judge of a reduction or suspension of the said sentences or a part thereof, and a recommendation from the said United States attorney for a commutation of sentences or other Executive clemency.

"That then and there, and at all times herein mentioned, the Commissioner of Indian Affairs, in the performance of his official duty, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, and as provided by law, was charged with the duties of assisting in the enforcement of the laws of the United States in reference to the liquor traffic affecting Indians, and particularly with the duty, when requested so to do, of advising and making recommendations to any judge before whom any prosecutions on the said subject may have been tried, and the United States attorney or other officer by whom the said prosecution had been conducted, concerning the effect upon the enforcement of the said law of any proposed leniency or clemency in connection with the punishment of persons found guilty of offenses thereunder.

"That then and there and while the said sentences were, as aforesaid, being held in abeyance one Willis N. Birdsall, who was then and there and theretofore had been attorney for the persons who had pleaded guilty as aforesaid, was desirous of obtaining and 40 intended to seek from the said judge of the said court a reduction or suspension of the said sentences or a part thereof, and was also desirous of obtaining and intended to seek from the President a commutation or other Executive clemency of the said sentences or a part thereof, and to that end was desirous of obtaining and intended to seek from the Commissioner of Indian Affairs a recommendation to that effect to the said judge and said United States attorney; that then and there on the 30th day of April, 1910, the said Thomas E. Brents, who was then and there, as he the said Willis N. Birdsall then and there well knew, a person acting for and on behalf of the United

States in the said official function, as aforesaid, under and by authority of the Department of the Interior of the United States, as aforesaid, did unlawfully, willfully, corruptly, and feloniously accept and receive from the said Willis N. Birdsall the sum of fifty dollars, lawful money of the United States, with the intent to have influenced thereby his decision and action on a question, matter, cause, and proceeding then and there expected and intended soon to be pending before him, and then and there expected soon by law to be brought before him in his official capacity and in his place of trust and profit, to wit, that is to say, with intent that when applications should be made to his said superior officer, the Commissioner of Indian Affairs, for said recommendation or recommendations for leniency or clemency, and when said Commissioner of Indian Affairs should call upon him the said Thomas E. Brents, either directly or through other subordinates of the said Commissioner of Indian Affairs, for information, report, advice, and recommendation thereon, particularly as to whether the enforcement of the said laws for the suppression of the liquor traffic with and among Indians would be furthered or prejudiced by said clemency or leniency, he the said Thomas E.

Brents should thereupon have his decision and action influenced by the receipt by him of the said sum of fifty dollars, so that he would falsely and without regard of truth and contrary to his duty as a person acting on behalf of the United States in an official capacity under and by virtue of the Department of the Interior, mislead and misinform said Commissioner of Indian Affairs, either directly or through other subordinates of the said commissioner, that under the facts and circumstances officially known to him, the said Thomas E. Brents, leniency and clemency ought to be granted to the said persons or any of them who had pleaded guilty, as aforesaid, and advise that the said commissioner should, in the interest of the enforcement of the said laws for the suppression of the liquor traffic with and among Indians, recommend to the said judge or to the said United States attorney, or to the said Secretary of the Interior, or to the said Attorney General, or to the said President, that leniency and clemency should be granted to said persons who had, as aforesaid, pleaded guilty, or to some of them, so that they should not be placed in prison, but the sentences should be changed and commuted to a fine without imprisonment, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

“H. J. BONE,

*“Special Assistant to the United States Attorney
for the Northern District of Iowa.”*

This indictment differs from the former indictment against Brents only in stating more in detail the rules and regulations of the Department of the Interior, and the customs, usages, and practices of that department and of the Bureau of Indian Affairs; and counsel

for the Government contends that it overcomes the objections urged and sustained to the former indictments.

But the difficulty with this contention is (admitting that the indictment is sufficiently direct and certain in its allegations charging the alleged offense, which may be doubtful) that there is no act of Congress conferring upon the Interior Department, or the Bureau of Indian Affairs, any duty whatever in regard to recommending to the executive or judicial departments of the Government whether or not Executive or judicial clemency shall be extended to, or withheld from, any person who may be charged with, or convicted of, selling intoxicating liquors to Indians, or of any other offense against the United States. Surely under the guise of a rule or departmental regulation, or an established custom or practice of an executive department, legislation can not be exercised; and an offense or crime against the United States can only be declared by the legislation of Congress.

This question has been so recently considered and determined by the Supreme Court in the case of the United States vs. George, U. S. (33 Sup. Ct. Rep. 412), in addition to the cases cited in the prior opinion of this court, that it is deemed unnecessary to consider the matter further.

The demurrer to each of the indictments now under consideration must be sustained, and the bail of each defendant exonerated.

It is accordingly so ordered.

Filed August 18, 1913. Lee McNeely, clerk.

43 The opinion heretofore filed in this case, and referred to in the foregoing opinion was written and filed on the 28th day of March, 1912, and is in words and figures following, to wit:

United States District Court, Northern District of Iowa, Eastern Division.

UNITED STATES, PLAINTIFF, ^{vs.} EVERETT E. VAN WERT, DEFENDANT.	No. 4149.
--	-----------

On demurrer to indictment.

Mr. H. J. BONE, special assistant United States attorney, for the United States.

Mr. S. C. HUBER, for defendant.

REED, district judge.

The defendant, Everett E. Van Wert, is charged by this indictment with having accepted a bribe in violation of sec. 117 of the Penal Code.

Omitting its formal parts the indictment charges in substance, that on and prior to May 30, 1910, the defendant was acting for and on behalf of the United States in an official function under the authority of the Department of the Interior, having been theretofore

duly appointed by the Commissioner of Indian Affairs as a special officer for the suppression of the liquor traffic among Indians, and in the performance of his lawful duties as provided by the rules and regulations of said department, was called upon and required

44 to assist in procuring testimony for the trial and conviction of persons who should unlawfully sell liquor to Indians, and assist in securing their punishment without partiality or favor and without violating or betraying the confidence reposed in him concerning the administration of public justice. That in April, 1909, certain persons, naming them, were indicted in this court for selling liquor to Indians in violation of law, and that each of said persons upon being arraigned pleaded guilty to such offense, and was adjudged to pay a fine of \$100 and costs, and be imprisoned for sixty days, and until the fine and costs were paid. It is then alleged:

"That before any of the aforesaid sentences were enforced or executed, and while the said court was holding in abeyance the execution of said sentences, in order to give said convicted persons an opportunity to obtain from the office or officers of the Bureau of Indian Affairs a recommendation for leniency, and after the judge of said court and the United States attorney in and for said district had both stated and announced that the aforesaid sentences of imprisonment of said persons would not be commuted or changed, unless a recommendation to that effect was made by the office or officers of the Bureau of Indian Affairs, one W. N. Birdsall, who was then and there and theretofore had been attorney for said indicted persons, did, on or about the 30th day of May, in the year 1910, within the jurisdiction of said court, unlawfully, willfully, corruptly, and feloniously offer and give and cause to be given the sum of \$75 lawful money of the United States to the defendant Everett E. Van Wert, who was then and there, as he, the said W. N. Birdsall then well knew, a person acting for and on behalf of the United States in an official function, under and by authority of the

45 Department of the Interior of the United States as aforesaid, with the intent then and there of him, the said W. N. Birdsall,

to unlawfully, willfully, feloniously, and corruptly influence the action of the said Everett E. Van Wert on a matter then and there pending before him in his official function and capacity as aforesaid, that is to say, in reporting and recommending and causing to be recommended to his superior officer, to wit, the Commissioner of Indian Affairs, that said persons who had pleaded guilty to the offenses of unlawfully selling liquor as aforesaid be not placed in prison, and that said sentences of imprisonment of said persons who had pleaded guilty as aforesaid be commuted to a fine without imprisonment; the said Everett E. Van Wert, then and there well knowing the purpose of said gift as aforesaid then and there offered and given to him by the said W. N. Birdsall, then and there in said district unlawfully, willfully, feloniously, and corruptly did take, accept, and receive said sum of \$75 from the said W. N. Birdsall,

with the intent and for the purpose aforesaid, contrary to the statutes in such case made and provided, etc."

To this indictment the defendant demurred upon the ground that it charges no offense.

The indictment is based upon sec. 117 of the Penal Code, which reads in this way:

"SECTION 117. Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; * * * shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States."

46 It is not alleged that defendant is or was an officer of the United States within the meaning of this section, nor could it well be, for such an officer is one who is either appointed by the President by and with the advice and consent of the Senate, or by the President alone, the courts of law, or the head of some executive department of the Government. U. S. Constitution, article 11, sec. 2; United States vs. Germaine, 99 U. S., 508; Martin v. United States, 168 Fed., 198-203; United States vs. Schlierholz, 133 Fed., 333.

Was the defendant "acting for or on behalf of the United States in any official capacity under or by virtue of the authority of any department of the Government" in recommending to the Commissioner of Indian Affairs that the sentence of imprisonment of the convicted persons be commuted and that they be not imprisoned? The offense denounced by the section above quoted is highly penal and must be construed with reasonable strictness at least; and unless the act charged to have been done by the defendant is a violation of some act of Congress, which declares such act to be an offense, or of some departmental rule or regulation authorized by Congress, the violation of which is declared by Congress to be an offense, no crime has been committed. United States vs. Eaton, 144 U. S., 677-688; Williamson v. United States, 207 U. S., 425-461; United States v. Grimaud, 220 U. S., 506-520. Nor is it sufficient to charge the offense in the words of the statute unless those words of themselves directly and with the requisite certainty set forth every essential fact necessary to constitute the offense denounced by the statute. United States vs. Carll, 105 U. S., 611; United States vs. Cruikshank, 92 U. S., 542; United States v. Hess, 124 U. S., 483.

47 The indictment alleges that the defendant had been duly appointed by the Commissioner of Indian Affairs as a "special officer" for the suppression of the liquor traffic among Indians, and in the performance of his duties, "as provided by the rules and regulations of said department, was called upon and required to assist in procuring testimony for the trial and conviction of persons who should unlawfully sell liquors to Indians, and to assist in securing their punishment, etc." The extent of the authority and duty of the defendant, so far as it is alleged by this indictment, was to assist in procuring testimony for the trial and conviction of persons who should unlawfully sell liquors to Indians, and assist in securing their punishment without partiality, etc. It is not alleged that the defendant procured or assisted in procuring testimony for the trial and conviction of the persons alleged to have been convicted, or that he accepted a bribe in any form whatever to influence his action, official or otherwise, in procuring such testimony or in securing their punishment. The averment is that certain persons had been convicted of selling liquors to Indians, and that a fine and sentence of imprisonment had been imposed upon them, the execution of which sentence was being withheld to afford the convicted persons an opportunity to apply for Executive clemency. Nothing further, therefore, was to be done, except to determine whether or not the convicted persons were entitled to Executive clemency. What duty, official or otherwise, rested upon the defendant with reference to extending clemency to these or any other convicted person, or in making any recommendations in regard thereto one way or another, is not alleged. Certainly no act of Congress imposes any such duty, and no rule, regulation, or practise of the Department of the Interior, the Bureau of Indian Affairs, or of the President has been referred to, or is alleged to have been established, which imposes upon any of such officers or employes any such duty or that requires of any of them any recommendation in regard thereto.

48 The Revised Statutes of the United States authorize the heads of each of the departments to adopt suitable rules and regulations for the conduct of the business of their respective departments, sec. 161; and the Commissioner of Indian Affairs shall under direction of the Secretary of the Interior, agreeably to such regulations as the President may prescribe, have the management of Indian affairs and of all matters arising out of Indian relations, sec. 463; and the President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, sec. 465. These sections authorize the adoption and promulgation of suitable rules and regulations for the carrying into effect of the various provisions of the acts of Congress relating to Indian affairs; but none of them provides that a violation of any such rules or regulations when adopted shall be an offense; and in the absence of such a provision a violation of the rules or regulations is not a crime.

It is urged by counsel for the Government that the court will take judicial notice of the rules and regulations of the executive departments, and that the averment in the indictment that the defendant, "in the performance of his lawful duties as provided by the rules and regulations of the Department of the Interior, was called upon and required to assist in procuring testimony for the trial and conviction of persons who should sell liquor to Indians, etc.," is a sufficient averment that such a rule or regulation had been established requiring such duty. It may be conceded that the courts will take judicial notice of the rules and regulations of the executive departments when any have been established; and admitting, without deciding, that the above-mentioned averment is an averment that rules and regulations have been established, the difficulty with the contention of counsel is that it is not alleged that the rules and regulations, if any there are, impose any duty whatever upon the

defendant with reference to extending executive clemency to these convicted persons. The averment of the indictment is that the alleged bribe was accepted by the defendant to influence his action upon a matter then pending before him in his official capacity and function as aforesaid; that is to say, "in reporting and recommending, and causing to be recommended to his superior officer, to wit, the Commissioner of Indian Affairs, that such convicted persons be not placed in prison, and such sentences be commuted to fines only." Surely no act of Congress imposes upon the Department of the Interior or any officer or employee thereof the duty that he shall recommend that any punishment imposed upon persons convicted of any offense against the laws relating to Indians shall not be enforced, and it is safe to say that no rule, regulation, or practise of said department or bureau required of the defendant or any officer or other employee of the department that he or they make any such recommendation as alleged. This alleges only what the defendant did because of the alleged bribe, or not the official or other duty of the defendant, which the alleged bribe was intended to influence. But if the allegation could be read, or treated as it may be supposed it was intended to be made, viz, that the defendant was required to investigate and determine whether or not the convicted persons were entitled to executive clemency, and make report thereof to his superior officer, it is sufficient to say that there is no act of Congress or rule or regulation of the department alleged to exist which required of him any such duty; and one cannot rightly be convicted under sec. 117 of the Penal Code of accepting a bribe to influence his official action upon a matter not required of him by law.

The act of March 3, 1909 (35 Stat., 781-2), making appropriations for the current and contingent expenses of the Interior 50 Department and for other purpose for the fiscal year ending June 30, 1910, appropriates \$50,000 "to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to suppress the traffic in intoxicating liquors among Indians." A like provision, except as to amount, is contained in the

Indian appropriation act for the fiscal year ending the year previous. It is quite probable that defendant was employed in the Bureau of Indian Affairs, and detailed to procure, or assist in procuring, evidence of unlawful sales of liquors to Indians, and the conviction of such offenders or other violators of the law relating to the Indians. But such service would hardly be an "official" duty within the meaning of the section of the Penal Code above quoted. However this may be, if the defendant violated any duty imposed upon him by virtue of his employment in the Bureau of Indian Affairs, which violation is a crime under any law of the United States, an indictment therefor must distinctly charge the offense committed and the facts constituting the same with the required certainty. It cannot be done by indirection, or by way of inference.

The indictment alleges that it had been announced by the judge and United States attorney that the sentences imposed upon the convicted persons would not be remitted or changed unless a recommendation to that effect was made by the Bureau of Indian Affairs. That may have been the opinion of those officers, but that imposed no duty upon the Indian Bureau or the defendant to make any recommendation in regard thereto, nor upon the President to consider it if made. Such announcements, if made, were therefore wholly immaterial.

Counsel for the Government cite and rely upon Caha vs. United States, 152 U. S., 211; United States v. Kessel, 62 Fed., 57; and Sharp v. United States, 138 Fed., 878, in support of the indictment.

51 It is sufficient to say that nothing is decided in any of these cases that would authorize the sustaining of this indictment. The demurrer to the indictment must therefore be sustained.

Filed March 28, 1912. A. J. Van Duzee, clerk.

The opinion by the court filed upon submission of the demurrer to former indictment is in words and figures as follows:

United States District Court, Northern District of Iowa, Eastern Division.

UNITED STATES, PLAINTIFF,
vs.
W. N. BIRDSDALL, DEFENDANT. | Nos. 4147 and 4148.

Submitted on demurrers to the indictments.

Mr. H. J. BONE, special assistant United States attorney, for the United States.

Messrs. MULLAN & PICKETT, and H. B. BOIES, and HURD, LENEHAN & KIESEL for the defendant.

REED, district judge.

These indictments respectively charge the defendant Birdsall with having paid to Van Wert and Brents, the defendants in the

two indictments just decided, the amounts alleged to have been accepted by them, respectively, in those indictments, with intent to have their official actions, as alleged therein, influenced thereby. The amounts alleged in these indictments to have been paid by Birdsall to Van Wert and Brents are alleged to have been paid in violation of sec. 39 of the Penal Code, with intent to influence the official action or duty, respectively, of Van Wert and Brents in matters pending before them in their official capacity, which said action or duty so intended to be influenced is alleged in these indictments to be exactly the same as that alleged in the indictments against Van Wert and Brents. As it is held in the respective indictments against Van Wert and Brents that they were not charged with any official or other duty to investigate and determine whether or not the convicted persons were entitled to executive clemency and report thereon to the Bureau of Indian Affairs, it follows that the defendant Birdsall committed no criminal offense in paying the sums alleged in these indictments to have been paid by him to Van Wert and Brents with intent to influence their said actions. Whatever may be said of the conduct of the respective defendants in these several indictments as alleged therein, such conduct was not a crime against the United States and cannot be punished as such. The demurrer to each of the indictments against Birdsall must therefore be sustained, and it will be so ordered.

Filed March 28, 1912. A. J. Van Duzee, clerk.

Filed March 28, 1912. A. J. Van Duzee, clerk.

52½ The opinion filed by the court upon submission of demurrer to indictment against Thomas E. Brents, and filed March 28, 1912, is in words and figures following:

UNITED STATES, PLAINTIFF,
vs.
THOMAS E. BRENTS, DEFENDANT. } No. 4150.

Submitted on demurrer to the indictment.

Mr. H. J. BONE, special assistant United States attorney, for the United States.

Mr. S. C. HUBER, for defendant.

REED, district judge.

This indictment and the demurrer thereto are identical, except as to the amount of the alleged bribe, with the indictment and demurrer thereto in the case of the United States vs. Van Wert No. 4149 just decided. The demurrer to this indictment will, therefore, as in that case, be sustained.

It is ordered accordingly.

Filed March 28, 1912. A. J. Van Duzee, clerk.

53 And on the 18th day of August, 1913, the following proceedings were had by said court in said cause as appears of record on page 190 of Minutes N of said court, to wit:

UNITED STATES OF AMERICA
vs.
WILLIS N. BIRDSALL. } Nos. 4164 and 4165, consolidated.

Now, this 18th day of August, 1913, this cause comes before the court upon demurrer of defendant to the indictment in said case, Harry J. Bone, Esq., special assistant United States attorney, appearing for the plaintiff, and Charles W. Mullan, Esq., appearing for the defendant, and arguments of counsel having been heard, the court sustains said demurrer; and

It is ordered by the court that said cause be and is hereby dismissed and that defendant go hence without day, and further that the bond given for the appearance of defendant be and is hereby discharged.

And on the 17th day of September, 1913, the following assignment of errors and petition for writ of error were filed in the office of said clerk in this cause, to wit:

In the District Court of the United States in and for the Northern District of Iowa, Eastern Division.

UNITED STATES OF AMERICA
vs.
WILLIS N. BIRDSALL. } Nos. 4164 and 4165 consolidated. Assignment of errors.

Comes now the plaintiff in error, the United States of America, by its attorney, A. Van Wagenen, and submits that in the record, proceedings, decision, and final judgment of the District Court 54 of the *final judgment of the District Court of the United States in and for the said Northern District, Eastern Division,* there is manifest error in this, to wit:

First. The court erred in rendering a decision in favor of the defendant and against the plaintiff in the above-entitled cause.

Second. The court erred in sustaining the demurrer to the indictment in the above-entitled cause.

Third. The court erred in dismissing the prosecution in the above-entitled cause.

Fourth. The court erred in holding that under the facts alleged in the indictment in the above-entitled cause there was no offense which had been committed by the defendant.

Fifth. The court erred in holding that under the act of March 4th, 1909, chapter 325, 35th Statutes, 1096, and other United States laws relating to such offenses, there was no offense which had been committed.

Sixth. The court erred in holding that the acts induced and intended to be induced by the payment of the bribe were not acts which the officer performed in his official capacity, and were not acts which when performed for a valuable consideration were such as to constitute the offense alleged, or any offense under the laws of the United States.

Seventh. The court erred in holding that under the facts alleged in the indictment no crime had been committed against he laws of the United States.

This assignment of errors is made as a part of and to be filed with a petition for a writ of error to the Supreme Court of the United States under the criminal appeals acts, and is filed in connection and with said petition for a writ of errors, and the petitioner prays that the above errors may be heard and decided upon and appealed to the Supreme Court as prayed.

A. VAN WAGENEN,
Asst. U. S. Attorney.
GROVER M. NEESE,
Asst. U. S. Attorney.

Filed September 17, 1913. Lee McNeely, clerk.

United States District Court, Northern District of Iowa, Eastern Division.

UNITED STATES OF AMERICA
vs.
WILLIS N. BIRDSDALL. } Nos. 4164 and 4165, consolidated.

Petition for writ of error.

To the Hon. Henry T. Reed, judge of the United States District Court for the Northern District of Iowa:

Your petitioner, United States of America, by its attorney, A. Van Wagenen, attorney for the United States in and for Northern District of Iowa, represents that on the 4th day of December, 1912, an indictment was returned against the defendant in the above-entitled cause, and upon the 28th day of April, 1913, the defendant filed thereto a demurrer; that on the 13th day of May, 1913, said demurrer was argued before Hon. Henry T. Reed, presiding, and was thereupon submitted and taken under advisement by 56 the said judge; that afterwards, to wit, on the 18th day of August, 1913, the said court, Hon. Henry T. Reed presiding, entered a decree sustaining the demurrer to said indictment, and this plaintiff holds there is manifest error in the aforesaid decree in that the court erred in holding that the acts alleged in the indictment did not constitute any crime under the law of the United States; all of which is more specifically set out in an assignment of errors filed herewith and made a part of this petition.

Your petitioner further shows that the decision rendered as aforesaid in effect holds that sec. 39 of the Penal Code, and other laws relating to acts charged in the indictment are invalid, and the said decision also involved the construction of said sec. 39 of the Penal Code of the United States and a construction of the laws of the United States relating to acts such as are charged as a violation in said indictment.

Wherefore in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays that it may be allowed a writ of error in said cause, to the honorable Supreme Court of the United States, and that proper order touching the security required, if any, may be made.

A. VAN WAGENEN,
United States Attorney.
Per GROVER M. NEESE,
Assistant United States Attorney.

Allowed to operate as a supersedeas, without bond on behalf of the United States this 17th day of September, 1913.

HENRY T. REED,
U. S. District Judge, Northern District of Iowa.

Filed September 17, 1913. Lee McNeely, clerk.

57 And on the 17th day of September, 1913, the following proceedings were had by said court in this cause, as follows:

UNITED STATES OF AMERICA <i>v.s.</i> WILLIS N. BIRDSDALL.	} Nos. 4164 and 4165, consolidated.
---	-------------------------------------

Now, this 17th day of September, 1913, comes the plaintiff in the above-entitled cause and presents to the court its petition praying for an allowance of a writ of error intended to be urged by it and the proper transcript of the record and papers and proceedings upon which judgment has been rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such order or other proceeding may be had as may be proper in the premises, and in consideration thereof, the court being fully advised in the premises;

It is ordered that the writ of error in the above-entitled case issue as prayed for in the petition, the same to act as a supersedeas, without bond on behalf of the United States.

(Signed) HENRY T. REED, *Judge.*

58 UNITED STATES OF AMERICA, *s.s.:*

The President of the United States, to the honorable the judges of the District Court of the United States for the Eastern Division of the Northern Judicial District of Iowa, greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you,

at the April term, 1913, thereof, between the United States of America, plaintiffs, and Willis N. Birdsall, defendant, Nos. 4164 and 4165, consolidated, a manifest error hath happened, to the great damage of the said United States of America, plaintiffs, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, and filed in the office of the clerk of the Supreme Court of the United States, on or before the 17th day of October, 1913, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 17th day of September, in the year of our Lord one thousand nine hundred and thirteen.

Issued at office in the city of Dubuque with the seal of the District Court of the United States for the Eastern Division of the Northern District of Iowa, dated as aforesaid.

[SEAL.]

LEE MCNEELY,

*Clerk District Court United States,
Eastern Division of the Northern District of Iowa.*

Allowed by—

HENRY T. REED,

United States District Judge, Northern District of Iowa.

59

RETURN TO WRIT.

UNITED STATES OF AMERICA,

Eastern Division of the Northern District of Iowa, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said District Court at office in the city of Dubuque this 26th day of September, A. D. 1913.

[SEAL.]

LEE MCNEELY,

Clerk of said Court.

(Indorsed:) No. 4164 & 4165, consolidated. United States Court, Eastern Division of the Northern District of Iowa. The United States of America vs. Willis N. Birdsall. Writ of error to the District Court of the United States for the Eastern Division of the

Northern Judicial District of Iowa. Filed 17th day of September, 1913. Lee McNeely, clerk.

60

Citation.

The United States of America, to Willis N. Birdsall, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern Division of the Northern District of Iowa, wherein the United States of America are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Henry T. Reed, judge of the District Court of the United States for the Northern District of Iowa, this 17th day of September, in the year of our Lord one thousand nine hundred and thirteen.

HENRY T. REED,
United States District Judge for the Northern District of Iowa.

61 Due and legal service of the within citation in the case of the United States against Willis N. Birdsall, Nos. 4164 & 4165, consolidated, is hereby acknowledged this 25th day of September, 1913.

CHAS. W. MULLAN.
H. B. BOIES.

(Indorsed:) No. 4164 & 4165, consolidated. United States District Court, Eastern Division of the Northern District of Iowa. United States vs. Willis N. Birdsall. Citation. Filed 26th day of September, 1913. Lee McNeely, clerk.

62 UNITED STATES OF AMERICA,

Northern District of Iowa, ss:

I, Lee McNeely, clerk of the District Court of the United States in and for the Northern District of Iowa, do hereby certify that the foregoing is a full, true, and perfect transcript of the record and proceedings in the cases of United States of America, plaintiff, vs. Willis N. Birdsall, Nos. 4164 and 4165, consolidated, including also the opinion of the court, filed March 28, 1912, in the cases against the same defendant, also against defts. Thos. E. Brents and Everett E. Van Wert, which opinions is included under order of the court.

I further certify and return that the writ of error which is hereto attached was served and filed in my office at Dubuque, Iowa, on the 17th day of September, A. D. 1913, and a copy thereof at the same time lodged in my office, and I now return said writ of error and, annexed thereto and hereto attached, an authenticated copy of the

record in the case mentioned in said writ of error, and the citation and proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court at my office in said district this 26th day of September, 1913.

[SEAL.]

LEE MCNEELY,
Clerk United States District Court, Northern District of Iowa.

(Indorsement on cover:) File No. 23878. N. Iowa, D. C. U. S. Term No. 727. The United States, plaintiff in error, vs. Willis N. Birdsall. Filed October 2d, 1913. File No. 23878.



#2

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 728.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THOMAS E. BRENTS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF IOWA.

FILED OCTOBER 9, 1913.

(23879.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 728.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THOMAS E. BRENTS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF IOWA.

INDEX.

	Original.	Print.
Caption.....	a	1
Order filing indictment.....	1	1
Indictment.....	2	1
Demurrer.....	8	5
Judgment.....	11	6
Assignment of errors.....	12	7
Petition for writ of error.....	14	8
Order allowing writ of error.....	16	9
Writ of error.....	17	9
Citation and service.....	19	10
Clerk's certificate.....	21	11



UNITED STATES OF AMERICA.

Northern District of Iowa, ss:

Pleas before the District Court of the United States in and for the Northern District of Iowa, Eastern Division, at a term begun and held at Dubuque in said district on the 4th Tuesda' of April, 1913, before Hon. Henry T. Reed, judge of the Northern District of Iowa.

UNITED STATES OF AMERICA }
v.s.
THOMAS E. BRENTS. } No. 4166. Criminal.

Be it remembered, that heretofore to-wit on the 4th day of December, A. D. 1912, the following proceedings were had by said court, in the foregoing entitled cause, as appears of record on page 14 of Record N, of said court, to-wit:

1 UNITED STATES OF AMERICA }
 v.s. } No. 4166. Presentment, bill of
 THOMAS E. BRENTS. } indictment.

Now, on this 4th day of December, 1912, the grand jury in and for the United States District Court in and for the Northern District of Iowa, heretofore duly empaneled, came into court and by their foreman presented to the court a true bill of indictment against Thomas E. Brents charging him with the crime of unlawfully accepting a bribe offered to him in his official capacity as special agent of the Department of Indian Affairs, committed within the jurisdiction of this court; whereupon, on motion of H. J. Bone, special United States attorney, it is ordered by the court that said bill of indictment be received and filed; thereupon the same was duly endorsed by the clerk as follows: Presented in open court by the foreman of the grand jury in presence of said grand jury and filed by me this 4th day of December, 1912.

Said bill of indictment so received and filed is in words and figures following, to-wit:

2 UNITED STATES OF AMERICA,

Eastern Division of the Northern District of Iowa, ss:

In the district court of the United States in and for the district aforesaid, at the December term thereof, A. D. 1912.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, in the court aforesaid, on their oath present and charge that on the 30th day of April, in the year 1910, and for more than a year next prior thereto, and during all the dates and times hereinafter mentioned and set forth, in said district and within the jurisdiction of said court, Thomas E. Brents was then and there a person acting for and in behalf of the United States in an official capacity, to wit, a special officer for the suppression of the liquor traffic with and among Indians, under and by virtue of the authority of a department of the Government, to-wit, the Department

of the Interior of the United States, the said Thomas E. Brents having been theretofore duly and legally appointed such special officer by the Commissioner of Indian Affairs, under and by virtue of the authority of the Secretary of the Interior.

That in the performance of his official functions as such special officer, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, the said Thomas E. Brents was then and there charged with the duty and called upon and required, among other things, to make recommendations to his said superior officer, the Commissioner of Indian Affairs, either directly or through other subordinates of the said Commissioner of Indian Affairs, concerning all matters connected with the conviction and punishment of persons who should unlawfully sell liquor to Indians, or otherwise violate the laws of the United States in reference to the liquor traffic affecting the Indians, and to inform and advise the said Commissioner of Indian Affairs, either
3 directly or through other subordinates of said commissioner,
when called on so to do, in all such matters and in all matters relating thereto, and particularly, when called on so to do, to inform the said commissioner whether or not the effective suppression of the liquor traffic with and among Indians would be furthered or prejudiced by Executive or judicial clemency in any particular case; and in all the said matters and in all matters relating thereto to act without partiality or favor and truthfully and without violating or betraying the confidence and trust reposed in him, the said Thomas E. Brents.

That at the April term of said court, in the year 1909, in and for said district, the following-named persons, to wit, Charles S. Parker, William Kascht, Peter Wagner, William Wagner, Carl J. White, Edward Westhoff, P. J. Goswiller, Leonard Krantz, and Jacob Guyer, were each and all indicted for unlawfully selling liquor to Indians in violation of laws of the United States, and each and all of said persons above named and indicted as aforesaid entered a plea of guilty at the December term, in the year 1909, of said court to the offences charged in said indictment, and each of said persons who were indicted and entered a plea of guilty as aforesaid were sentenced by said court at the April term, in the year 1910, to pay a fine of one hundred dollars and be imprisoned for a period of sixty days.

That before any of the aforesaid sentences were enforced or executed an application was made to the judge of the said court for a reduction of the sentences and for a suspension thereof or part thereof; and also it was stated on behalf of the said persons who had pleaded guilty that an effort would be made to obtain a commutation of the said sentences by Executive action;

That then and there the judge of the said court announced that he would not change or reduce or suspend the said sentences or any part thereof, unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs; and the United States attorney in the aforesaid district announced that he
4 would not recommend a commutation or other Executive clem-

ency, unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs.

That then and there and during all the dates and times herein mentioned it was and long had been the settled usage and practice for the United States judges in determining upon sentences and upon the application for changes, reductions, or suspensions thereof, to consult the United States attorney, and either directly or through him the administrative officer charged with the enforcement of the laws in question, including laws for the suppression of the liquor traffic with and among the Indians, the said Commissioner of Indian Affairs; and likewise it had been and was the settled usage and practice of the President, in the exercise of his power of extending Executive clemency, to consult the Attorney General; and likewise it had been and was the settled usage and practice of the Attorney General, for the purpose of advising the President on the said subject, to consult with the United States attorney or other officer by whom the prosecution had been conducted.

That then and there, and before any of the aforesaid sentences were enforced or executed, said court held the execution thereof in abeyance in order to give the said persons who had pleaded guilty, as aforesaid, an opportunity to apply to and obtain from the said Commissioner of Indian Affairs said recommendation to the said judge of a reduction or suspension of the said sentences or a part thereof, and a recommendation from the said United States attorney for a commutation of sentence or other Executive clemency.

That then and there and at all the times herein mentioned the Commissioner of Indian Affairs, in the performance of his official duty, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior,

5 of assisting in the enforcement of the laws of the United States in reference to the liquor traffic affecting Indians, and particularly with the duty, when requested so to do, of advising and making recommendations to any judge before whom any prosecutions on the said subject may have been tried, and the United States attorney or other officer, by whom the said prosecution had been conducted, concerning the effect upon the enforcement of the said law of any proposed leniency or clemency in connection with the punishment of persons found guilty of offenses thereunder.

That then and there and while the said sentences were, as aforesaid, being held in abeyance, one Willis N. Birdsall, who was then and there and theretofore had been attorney for the persons who had pleaded guilty as aforesaid, was desirous of obtaining and intended to seek from the said judge of the said court a reduction or suspension of the said sentences, or a part thereof, and was also desirous of obtaining and intended to seek from the President a commutation or other Executive clemency of the said sentences, or a part thereof, and to that end was desirous of obtaining and intended to seek from the Commissioner of Indian Affairs a recom-

mendation to that effect to the said judge and said United States attorney; that then and there on the 30th day of April, 1910, the said Thomas E. Brents, who was then and there, as he, the said Willis N. Birdsall, then and there well knew, a person acting for and on behalf of the United States in the said official function, as aforesaid, under and by authority of the Department of the Interior of the United States, as aforesaid, did unlawfully, wilfully, corruptly, and feloniously accept and receive from the said Willis N. Birdsall the sum of fifty dollars, lawful money of the United States, with the intent to have influenced thereby his decision and action on a question, matter, cause, and proceeding then and there expected

6 and intended soon to be pending before him, and then and there expected soon by law to be brought before him in his official capacity and in his place of trust and profit, to wit, that is to say, with intent that when applications should be made to his said superior officer, the Commissioner of Indian Affairs, for said recommendation or recommendations for leniency or clemency, and when said Commissioner of Indian Affairs should call upon him, the said Thomas E. Brents, either directly or through other subordinates of the said commissioner for information, report, advice, and recommendation thereon, particularly as to whether the enforcement of the said laws for the suppression of the liquor traffic with and among Indians would be furthered or prejudiced by said clemency or leniency, he, the said Thomas E. Brents, should thereupon have his decision and action influenced by the receipt by him of the said sum of fifty dollars, so that he would falsely and without regard of truth, and contrary to his duty as a person acting on behalf of the United States in an official capacity, under and by virtue of the Department of the Interior, mislead and misinform said Commissioner of Indian Affairs, either directly or through other subordinates of the said commissioner, that under the facts and circumstances officially known to him, the said Thomas E. Brents, leniency and clemency ought to be granted to the said persons or any of them who had pleaded guilty, as aforesaid, and advise that the said commissioner should, in the interest of the enforcement of the said laws for the suppression of the liquor traffic with and among Indians, recommend to the said judge or to the said United States attorney, or to the said Secretary of the Interior, or to the said Attorney General, or to the said President, that leniency and clemency should be granted

7 to said persons, who had, as aforesaid, pleaded guilty, or to some of them, so that they should not be placed in prison, but the sentences should be changed and commuted to a fine without imprisonment; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Signed) H. J. BONE,

*Special Assistant to the United States Attorney for
the Northern District of Iowa.*

(Endorsed:) No. 4166. District Court of the United States, Eastern Division of the Northern District of Iowa. The United States vs. Thomas E. Brents. Indictment. Accepting bribe. Sect. 117, Criminal Code. Penalty: Fine not more than three times amount of money involved and not more than three years. A true bill. (Signed) G. M. Bigelow, foreman. Presented in open court by the foreman of the grand jury, in the presence of the grand jury, and filed by me this 4th day of December, 1912. A. J. Van Duzee, clerk; M. L. Normon, deputy.

8 THE UNITED STATES, PLAINTIFF, | No. 4166. Demurrer to indictment.
 vs.
THOMAS E. BRENTS, DEFENDANT. |

Comes now the defendant in the above-entitled action and demurs to the indictment returned by the grand jury herein upon the following grounds:

1st. That the facts stated and set forth in said indictment do not constitute any crime or offense under the Constitution and laws of the United States.

2nd. That the facts set forth in said indictment do not charge the defendant with the offense of accepting a bribe or any other offense whatsoever under the Constitution and laws of the United States.

3rd. That said indictment wholly fails to charge the defendant with any crime or offense whatsoever and wholly fails to set forth or allege any facts which constitute an offense or crime under the Constitution and laws of the United States in this, to wit:

I. That said indictment fails to charge, allege, or set forth that the said Thomas E. Brents was an officer of the Government of the United States, or that he was a person acting for or on behalf of the United States in an official function, or that he was acting by authority of any department or office of the Government thereof, and that said indictment wholly fails to charge the defendant with receiving or accepting any money or other thing of value with intent to influence him while acting in any official function or under or by authority of any department or office of the Government.

9 II. That said indictment wholly fails to charge, allege, or set forth that any matter, question, cause, or proceeding was pending before the said defendant in his official function or before him as an officer of the United States or as a person acting for or in behalf of the United States in any official function or as a person acting under or by authority of any department or officer of the Government of the United States at the time of the alleged act of the defendant which is charged as accepting a bribe in said indictment.

III. That said indictment fails to show, set forth, and charge that the receiving of the sum of \$50.00 to the defendant as alleged in said indictment was received by the defendant for the purpose of influencing his decision or action in any matter, question, cause, or proceeding which was at the time of the alleged payment or might thereafter

be pending or which had been by law brought before him in his official capacity or in his place of trust and profit and does not charge the said defendant with receiving or accepting money or other thing of value with intent to influence him to commit or aid in committing or to collude with others for the commission of any fraud on the United States, or to induce him to do or omit to do any act in violation of *hua* lawful duty or any act against the Constitution, laws of the United States, or the regulations of any department thereof or against the practices or established usages of any department of the Government.

IV. That said indictment wholly fails to allege, set forth, or show any regulations of any department of the Government or of any settled practice or usage under which it was the custom, practice, or usage of any administrative or judicial officer of the Government to consult defendant as to the reduction or suspension of any sentence or judgment or penalty imposed or rendered by any judge of the 10 United States upon any person for the violation of the laws relating to the suppression of the sale of intoxicating liquors to and among the Indians, and wholly fails to allege, set forth, or charge that it was the duty of defendant under any existing regulation of any department of the Government, or under any established practice and usage of any department of the Government set forth in said indictment, to advise or recommend to the Commissioner of Indian Affairs, to the Secretary of the Interior, to the Attorney General, to the President of the United States, to the United States attorney, or to any judge of the United States upon any person found guilty of violating the law relating to the suppression of the sale of intoxicating liquors among the Indians, and that such indictment wholly fails to say that in receiving the money alleged to have been paid defendant said payment was received for the purpose and with intent to influence his decision in any matter which he was required to decide or which it was his duty to decide under the Constitution and laws of the United States or any regulation or established practice or usage of any department of the Government.

V. That said indictment wholly fails to allege, set forth, or show the violation of any act of Congress, rule or regulation of any department of the Government, the violation of which said law, rule, or regulation constitutes an offense against the Constitution and laws of the United States.

(Signed) THOMAS E. BRENTS,
 By S. C. HUBER, *His Atty.*

Filed April 23, 1913. Lee McNeely, clerk.

11 UNITED STATES }
 vs. } No. 4166.
 THOMAS E. BRENTS. }

Now, on this 18th day of August, A. D. 1913, this cause comes before the court upon the demurrer of defendant to the indictment in

said case, Harry J. Bone, Esq., special assistant United States attorney, appearing for the plaintiff, and S. C. Huber, Esq., appearing for the defendant, and argument of counsel having been heard, the court sustains said demurrer, and

It is ordered by the court that said cause be, and is hereby, dismissed, and that defendant go hence without day, and further that the bond given for the appearance of defendant be, and is hereby, discharged.

12 In the District Court of the United States in and for the Northern District of Iowa, Eastern Division.

UNITED STATES OF AMERICA }
vs. } No. 4166. Assignment of errors.
THOMAS E. BRENTS. }

Comes now the plaintiff in error, the United States of America, by its attorney, A. Van Wagenen, and submits that the record, proceedings, decision, and final judgment of the District Court of the United States in and for said Northern District, Eastern Division, there is manifest error in this, to wit:

First. The court erred in rendering a decision in favor of the defendant and against the plaintiff in the above-entitled cause.

Second. The court erred in sustaining the demurrer to the indictment in the above-entitled cause.

Third. The court erred in dismissing the prosecution in the above-entitled cause.

Fourth. The court erred in holding that under the facts alleged in the indictment in the above-entitled cause there was no offense which had been committed by the defendant.

Fifth. The court erred in holding that under section 117 of the Penal Code and other criminal statutes relating to the acts charged, there was no offense which had been committed.

Sixth. The court erred in holding that the acts induced and intended to be induced by the payment of the bribe were not acts performed by the defendant in his official capacity and were not acts which, when performed for a valuable consideration, were such as constitute the offense alleged or any offense under the laws of the United States.

Seventh. The court erred in holding that under the facts alleged in the indictment no crime had been committed against the laws of the United States.

13 This assignment of errors is made as a part of and to be filed with a petition for a writ of error to the Supreme Court of the United States under the original appeals acts and is filed in connection and with said petition for a writ of errors and the peti-

titioner prays that the above errors may be heard and decided upon an appeal to the Supreme Court as prayed.

(Signed) A. VAN WAGENEN,
United States Attorney.
 GROVER M. NEESE,
Ass't U. S. Atty.

Filed September 17, 1913. Lee McNeely, clerk.

14 United States District Court, Northern District of Iowa,
 Eastern Division.

UNITED STATES OF AMERICA }
 vs. } No. 4166. Petition for writ of errors.
 THOMAS E. BRENTS. }

To the Hon. HENRY T. REED,
Judge of United States District Court,
for the Northern District of Iowa.

Your petitioner, United States of America, by its attorney, A. Van Wagenen, attorney for United States in and for Northern District of Iowa, represents that on the 4th day of December, 1912, an indictment was returned against the defendant in the above-entitled cause, and upon the 23d day of April, 1913, the defendant filed thereto a demurrer; that on the 13th day of May, 1913, said demurrer was argued before his honor Henry T. Reed, presiding, and was thereupon submitted and taken under advisement by the said judge; that afterwards, to wit, on August 18, 1913, the said court, Henry T. Reed, presiding, entered a decree sustaining the demurrer to said indictment and this plaintiff holds there is manifest error in the aforesaid decree in that the court erred in holding that the acts alleged in the indictment did not constitute any crime under the laws of the United States; all of which is more specifically set out in an assignment of errors filed herewith and made a part of this petition.

Your petitioner further shows that the decision rendered as aforesaid in effect hold that secs. 117 of the Penal Code and other laws relating to acts charged in the indictment are invalid, and the said decision also involved the construction of said sec. 117, of the Penal Code of the United States, and a construction of the *the* laws of the United States relating to acts such as are charged as a violation in said indictment.

Wherefore in order that your petitioner may obtain relief
 15 in the premises and have opportunity to show the errors complained of, your petitioner prays that it may be allowed a writ of error in said cause to the honorable Supreme Court of the

United States, and that proper order touching the security required, if any, may be made.

(Signed) A. VAN WAGENEN,
United States Attorney.

Per GROVER M. NEESE,
Assistant United States Attorney.

Filed September 17, 1913. Lee McNeely, clerk.

16 In the United States District Court in and for the Northern District of Iowa, Eastern Division.

UNITED STATES OF AMERICA
vs.
THOMAS E. BRENTS. } No. 4166. Order allowing writ of error.

Now, this 17th day of September, 1913, comes the plaintiff in the above-entitled cause and presents to the court its petition praying for allowance of a writ of error, intended to be urged by it, and the proper transcript of the record and papers and proceedings upon which judgment has been rendered, duly authenticated, may be sent to the United States Supreme Court, and that such order or other proceeding may be had as may be proper in the premises; and in consideration thereof, the court being fully advised in the premises:

It is ordered that the writ of error in the above-entitled case issue as prayed for in the petition, the same to act as supersedeas.

17 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the honorable the judges of the District Court of the United States for the Eastern Division of the Northern Judicial District of Iowa, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, at the April term, 1913, thereof, between the United States of America, plaintiffs, and Thomas E. Brents, defendant, No. 4166, a manifest error hath happened, to the great damage of the said United States of America, plaintiffs, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington and filed in the office of the clerk of the Supreme Court of the United States, on or before the 17th day of October, 1913, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to

correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 17th day of September, in the year of our Lord one thousand nine hundred and thirteen.

Issued at office in the city of Dubuque with the seal of the District Court of the United States for the Eastern Division of the Northern District of Iowa, dated as aforesaid.

[SEAL.]

LEE MCNEELY,

*Clerk District Court United States, Eastern Division
of the Northern District of Iowa.*

Allowed by—

HENRY T. REED,

United States District Judge, Northern District of Iowa.

UNITED STATES OF AMERICA,

—Division of the Northern District of Iowa, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said district court at office in the city of Dubuque, Iowa, this 26th day of September, A. D. 1913.

LEE MCNEELY,

Clerk of said Court.

(Indorsed:) No. 4166. United States District Court, Eastern Division of the Northern District of Iowa. United States of America vs. Thomas E. Brents. Writ of error to the District Court of the United States for the Eastern Division of the Northern Judicial District of Iowa. Filed 17th day of September, 1913. Lee McNeely, clerk.

The United States of America to Thomas E. Brents, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Eastern Division of the Northern District of Iowa, wherein the United States of America are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Henry T. Reed, judge of the District Court of the United States for the Northern District of Iowa, this 17th day of September, in the year of our Lord one thousand nine hundred and thirteen.

HENRY T. REED,

United States District Judge for the Northern District of Iowa.

20 Due and legal service of the within citation is hereby accepted at Tama, Tama County, Iowa, on this 25th day of September, 1913.

THOMAS E. BRENTZ,
By S. C. HUBER, His Atty.

(Indorsed:) No. 4166. United States District Court, Eastern Division of the Northern District of Iowa. United States vs. Thomas E. Brents. Citation. Filed 26th day of September, 1913. Lee McNeely, clerk.

21 UNITED STATES OF AMERICA,
Northern District of Iowa, ss:

I, Lee McNeely, clerk of the District Court of the United States in and for the Northern District of Iowa, do hereby certify that the foregoing is a full, true, and perfect transcript of the record and proceedings in the case of United States of America, plaintiff, vs. Thomas E. Brents, No. 1466, criminal, as fully as the same remain on file and of record in my office as such clerk.

I further certify that the writ of error which is hereby attached was served and filed in my office at Dubuque on the 17th day of September, A. D. 1913, and a copy of the same at the same time lodged in my office, and I now return the said writ of error and annexed thereto and hereto attached an authenticated copy of the record in the case mentioned in said writ of error, and the citation and proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court at my office in said district this 26th day of September, 1913.

[SEAL.]

LEE MCNEELY,
*Clerk United States District Court,
Northern District of Iowa.*

(Indorsement on cover:) File No. 23879. N. Iowa, D. C. U. S. Term No. 728. The United States, plaintiff in error, vs. Thomas E. Brents. Filed October 2d, 1913. File No. 23879.

